

Chapter 13 and the Tithe: Is God a Creditor?

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I. INTRODUCTION

For the last eight years Bruce and Nancy Young have been doing what people for thousands of years have felt obligated to do—giving a portion of their wealth to their god. They have also been doing something else that people have been doing for thousands of years—not paying their debts. As a result of their nonpayment, the Youngs declared bankruptcy, but they continued to give \$13,450 in donations to the Crystal Evangelical Free Church while bankrupt.¹ Now the Justice Department has asked for it all back so that creditors can be paid the money they are owed.² But Baptists, Catholics, Lutherans, Mormons and evangelical groups have rallied around the Youngs.³ They claim that, in essence, their god has a super-ultrapriority claim on one's money and that god must be put "first in the area of one's finances."⁴ To the Youngs, and many other people who take advantage of bankruptcy relief, god is the ultimate creditor.

In the Judeo-Christian faith, such a giving of wealth is known as the "tithe."⁵ The concept of the tithe, however, is not limited to Judaism and Christianity, but is universal in appeal.⁶

* I would like to thank Professor Nancy B. Rapoport for the title of this Comment.

¹ Laurie Goodstein, *Religious Groups Fight U.S. in Bankruptcy Case*, WASH. POST, May 23, 1994, at A1.

² *Id.*

³ *Id.*

⁴ The Reverend Stephen Goold, senior pastor at the Crystal Evangelical Free Church, referred to the tithe as "a biblical injunction . . . to put God first in the area of one's finances." *Id.* at A8. Rev. Goold's "biblical injunction" can be found in the Book of Malachi, where refusal to tithe is viewed as robbing god:

Will a man rob God? Yet you are robbing me. But you say, "How have we robbed thee?" In tithes and contributions. You are cursed with a curse, for you are robbing me, the whole nation of you. Bring the whole tithe into the storehouse, so that there may be food in my house and test me now in this, says our Lord of hosts, if I will not open for you the windows of heaven, and pour out for you a blessing until there is no more need.

Malachi 3:8-12.

⁵ A tithe is a "tenth part of one's income, contributed for charitable or religious purposes." BLACK'S LAW DICTIONARY 1484 (6th ed. 1990). The term "tithe" derives from

Since the formation of the United States, the practice of tithing has enjoyed the absence of governmental interference. The spheres of government and religion have remained sufficiently separate so that no court had to determine the degree to which government power may impose upon the practice of the tithe. That is, until 1984.

In 1984 Congress amended the Bankruptcy Code ("Code") to require that an individual debtor seeking relief from a consumer debt in Chapter 13 must dedicate all of her "projected disposable income" to unsecured creditors in order to meet the standard of good faith.⁷ The Code defines disposable income as "income which is received by the debtor and which is not reasonably necessary to be expended . . . for the maintenance or support of the debtor or a dependent of the debtor"⁸ The debtor must list and obtain judicial approval of all "necessary expenses."⁹ Thus, a bankruptcy judge must

the common Christian practice of giving a specified percentage of one's income to their church—traditionally 10%. *See, e.g., Genesis 28:22* ("[T]his stone, which I have set for a pillar, shall be God's house; and of all that thou givest me I will give the tenth to thee."). From this section and other parts of the Bible, our understanding has come to be that a tithe is 10% of one's income. In this Comment, however, I use the term much more broadly. I do not restrict the term "tithe" to merely contributions of 10%, but rather I use it to encompass any religiously compelled financial contribution—regardless of amount and irrespective of faith. I have also chosen to use the term "god" with a lower case "g," realizing that not all faiths refer to their supreme being as "God."

⁶ *See, e.g., ABDEL H. MAHMUD, THE CREED OF ISLAM* 21 & n.10 (Mahmud A. Haleem trans., 1978) (defining the Islamic concept of zakah, or alms-tax, as a "statutory portion of one's wealth given every year for the use of the needy and other services"); MELFORD E. SPIRO, *BUDDHISM AND SOCIETY: A GREAT TRADITION AND ITS BURMESE VICISSITUDES* 110 (1970) (describing the Buddhist belief that one-fourth of one's income should be devoted to dana, or religious giving).

⁷ In order for a plan to be confirmed, a debtor must satisfy § 1325(b)(1), which states:

If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan—

(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the plan provides that all of the debtor's disposable income to be received in the three-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.

11 U.S.C. § 1325(b)(1) (1988).

⁸ *Id.* § 1325(b)(2).

⁹ *Id.*

determine the legitimacy of allowing a debtor to claim the tithe as a necessary expense.

Bankruptcy courts have been split for ten years concerning whether debtors should be able to claim the tithe as a necessary expense and, thus, further deprive their creditors of repayment.¹⁰ Although most courts have denied the tithe, some have found it mandated by the Free Exercise Clause of the Constitution.¹¹ This issue has not been before the Supreme Court, but it appears that nothing less than a decree from the High Court will bring a modicum of uniformity to the analysis.

This Comment will analyze the free exercise implications of the choices available to bankruptcy judges today.¹² It will view these options in light of the recent overruling of the 1990 Supreme Court case *Employment Division v. Smith*¹³ by Congress.¹⁴ And it will come to the conclusion that in dealing with bankruptcy and the tithe there are no clear answers. There are definite costs no matter which option is taken. This Comment will argue that the best solution is to deny tithing as a necessary expense in filing a Chapter 13 plan for bankruptcy relief and that doing so does not violate the free exercise right of the debtor.

II. BANKRUPTCY BACKGROUND

A. *The 1984 Amendment*

In order to fully appreciate the situation that exists in modern bankruptcy jurisprudence concerning the tithe, a brief examination of the events leading up to the 1984 amendments and a brief overview of Chapter 13 relief is necessary.

Bankruptcy is a remedial system provided for by federal law—more specifically Title 11 of the United States Code. It is a collective remedy that, with few exceptions, encompasses all of the debtor's assets and debts. It is

¹⁰ See *infra* part III.

¹¹ See *infra* part III.

¹² Note that allowing a debtor to tithe within the Chapter 13 bankruptcy framework would also possibly violate the Establishment Clause of the First Amendment. However, because this Comment reaches the conclusion that bankruptcy courts should not allow the tithe as a necessary expense in a Chapter 13 bankruptcy petition, the Comment does not reach that issue. Other constitutional rights may also be implicated, for example, associational and free speech rights. A full discussion of all First Amendment rights possibly affected, however, is beyond the scope of this Comment.

¹³ 494 U.S. 872 (1990).

¹⁴ See Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488.

designed to afford relief to the debtor by resolving and settling current debts, while at the same time protecting creditors and guarding their interests.

The current Code was enacted as the Bankruptcy Reform Act in 1978 and underwent two major amendments in 1984 and 1986.¹⁵ Section 1325(a) originally only required a debtor to file in good faith and to prove that unsecured creditors would get no less in the Chapter 13 repayment plan as they would in a Chapter 7 liquidation.¹⁶ Debtors and creditors soon became dissatisfied with the good faith and liquidation equivalence standard. Because debtors could easily meet the "not less than" standard of section 1325(a)(4), courts began to deny confirmation if the confirmation plan did not represent the debtor's "best efforts"—even though there is no statutory basis for requiring that result under section 1325(a)(4).¹⁷

Courts began to reach disparate results depending on whether they applied the best efforts approach and what they thought was a best effort. Some courts

¹⁵ Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as amended at 11 U.S.C. §§ 101-1330).

¹⁶ 11 U.S.C. § 1325(a) provides:

(a) the court shall confirm a plan if—

- (1) The plan complies with the provisions of this chapter and with the other applicable provisions of this title;
- (2) any fee, charge, or amount required under chapter 123 of title 28, or by the plan, to be paid before confirmation, has been paid;
- (3) *the plan has been proposed in good faith* and not by any means forbidden by law;
- (4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is *not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date*;
- (5) with respect to each allowed secured claim provided for by the plan—
 - (A) the holder of such claim has accepted the plan;
 - (B) (i) the plan provides that the holder of such claim retain the lien securing such claim; and
 - (ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; or
 - (C) the debtor surrenders the property securing such claim to such holder; and
- (6) the debtor will be able to make all payments under the plan and to comply with the plan.

11 U.S.C. § 1325(a) (1982) (emphasis added).

¹⁷ See, e.g., *In re Burrell*, 2 B.R. 650 (Bankr. N.D. Cal. 1980).

required more than seventy percent payouts to unsecured creditors,¹⁸ while others would confirm plans that proposed to pay out only one percent.¹⁹ The broad goal of uniformity was being undermined and bankruptcy was becoming a device for debtor abuse. In the words of the credit industry, courts that were allowing confirmation of plans that paid back as little as one percent were "enticing a disturbingly large number of debtors into having their debts avoided, often without [the] economic penalty of loss of assets being coupled to the economic benefit of avoidance of their debts."²⁰ In an effort to create more uniformity and to curb debtor abuse, Congress reformed the Code in 1984.²¹

B. Chapter 13 Relief

As the Code exists today, an individual debtor may file under three different chapters: Chapter 7 (liquidation),²² Chapter 11 (repayment),²³ or Chapter 13 (repayment).²⁴ In a Chapter 13, the debtor's income is divided into two categories: disposable and nondisposable income.²⁵ Nondisposable income is income that is necessary for the support and maintenance of the debtor and

¹⁸ See, e.g., *In re Raburn*, 4 B.R. 624 (Bankr. M.D. Ga. 1980).

¹⁹ See, e.g., *In re Johnson*, 6 B.R. 34 (Bankr. N.D. Ill. 1980).

²⁰ *Bankruptcy Reform: Hearings Before the Senate Judiciary Comm.*, 98th Cong., 1st Sess. 486, 488-89 (1983) (prepared statement of the International Consumer Credit Association).

²¹ Congress stated the goals of the 1984 Amendments very generally. The first goal was the eradication of the great disparities among various judicial districts in their application of Chapter 13. The second goal was the uniform application of bankruptcy law provisions nationally. *Personal Bankruptcy: Oversight Hearings Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 97th Cong., 1st & 2d Sess. 181-83 (1981-82) (statement of Hon. Conrad K. Cyr, Bankruptcy Judge); see Karen Gross, *Preserving a Fresh Start for the Individual Debtor: The Case for Narrow Construction of the Consumer Credit Amendments*, 135 U. PA. L. REV. 59, 61-62 (1986) ("The Amendments were adopted in response to concerted pressure from the consumer credit industry, ostensibly to eliminate perceived abuses of the Bankruptcy Code and the bankruptcy process by individual debtors.") (footnotes omitted); Jeffrey W. Morris, *Substantive Consumer Bankruptcy Reform in the Bankruptcy Amendments Act of 1984*, 27 WM. & MARY L. REV. 91, 137-63 (1985) (examination of changes designed to prevent debtor abuse of Chapter 13).

²² 11 U.S.C. §§ 701-766.

²³ *Id.* §§ 1101-1174. Generally, Chapter 11 is used for business bankruptcy, but see *infra* notes 107-10 and accompanying text.

²⁴ *Id.* §§ 1301-1330.

²⁵ *Id.* § 1325(b)(1)(B).

her family.²⁶ A debtor must formulate a proposed budget detailing all of her necessary expenses and submit the budget for court approval.²⁷ All other income not included in the proposed budget is considered disposable income and must be entirely devoted to the repayment of the debtor's unsecured creditors.²⁸

The minimum required length of a Chapter 13 repayment plan is three years, although a creditor may request that the period be extended to five years.²⁹ At the end of the period of repayment, if the debtor has acted in good faith, any unpaid portion of the unsecured debt is discharged—which means that the debtor is relieved of the duty to make payments on the discharged portion.³⁰ The debtor receives a “fresh start.”³¹

The Code mitigates the seeming unfairness of the discharge by allowing an unsecured creditor, or the trustee in bankruptcy, who does not receive full repayment to challenge the inclusion of items within the proposed budget that he feels are frivolous, excessive, or unjustified.³² The court must then determine if the challenged item is a “reasonably necessary”³³ expense.³⁴

The determination of what is reasonably necessary is not so difficult when the challenged item is a luxury automobile,³⁵ tuition to expensive private

²⁶ *Id.* § 1325(b)(2)(A).

²⁷ *Id.* § 1325(b)(1)(B).

²⁸ *Id.*

²⁹ *Id.* § 1322(c). The trustee in bankruptcy may also request the extension, or the court may mandate the five year term if equity requires it.

³⁰ *Id.* § 1328.

³¹ The goal of long-term rehabilitation of the debtor is commonly referred to as the “fresh start” policy. Provided that the debtor has complied with the Code's requirements and has surrendered executable assets or sufficient future income for distribution to creditors, the debtor is entitled to a new beginning, unburdened by the unpaid balance of prebankruptcy debts. *See* LAWRENCE P. KING & MICHAEL L. COOK, CREDITORS' RIGHTS, DEBTORS' PROTECTION AND BANKRUPTCY 777 (1985); *see also* BRIAN A. BLUM, BANKRUPTCY AND DEBTOR/CREDITOR § 10.6 (1993); ELIZABETH WARREN & JAY L. WESTBROOK, THE LAW OF DEBTORS AND CREDITORS 199–225 (2d ed. 1991).

³² 11 U.S.C. § 1325(b)(1).

³³ The 1984 Amendments to the Code define “luxury goods or services” as those that are not reasonably necessary. *Id.* § 523(a)(2)(C). At least one commentator has drawn the conclusion from that definition that all other goods are, in principle, “reasonably necessary.” HENRY J. SOMMER, CONSUMER BANKRUPTCY LAW AND PRACTICE § 12.3.3 (3d ed. 1988). Such a conclusion gains credibility in light of decisions such as *In re Tinneberg*, 59 B.R. 634, 635 (Bankr. E.D.N.Y. 1986), which held that money to buy a newspaper is reasonably necessary and any denial of such would be inhumane.

³⁴ COLLIER ON BANKRUPTCY § 1325.08 (Lawrence P. King et al. eds., 15th ed. 1994).

³⁵ *See, e.g., In re Reyes*, 106 B.R. 155, 157–58 (Bankr. N.D. Ill. 1989) (debtor's purchase of extravagant four-wheel drive vehicle held to be an “obvious indulgence”); *In re*

schools,³⁶ or large amounts of recreation expenses.³⁷ But the decision becomes much more complex when the challenged item is a tithe to the debtor's church. The decision that must be made by a bankruptcy judge may evolve beyond whether or not the tithe is reasonably necessary and implicate constitutional concerns.³⁸ The decision is full of pitfalls and constitutional quagmires, and it is not surprising that court decisions over the past ten years have been far from uniform.

III. THE JUDICIAL APPROACH TO THE TITHE IN BANKRUPTCY

In the years preceding the 1984 Amendments and in the years immediately following, courts tended to ignore the free exercise implications of the tithe. They were inclined to decide that the tithe, although a "noble thought and gesture,"³⁹ was an unnecessary expense when weighed against the debtor's obligations to repay their debts. It was unfair to creditors because allowing the tithe, in essence, forced the creditors to support the debtor's church.⁴⁰

Rogers, 65 B.R. 1018, 1019-20 (Bankr. E.D. Mich. 1986) (confirmation of plan was denied because debtor chose to keep sports car with large debt still owed on it rather than keep a less expensive car with a smaller unpaid balance).

³⁶ See, e.g., *In re Navarro*, 83 B.R. 348, 354-57 (finding that tuition for religious education is not per se unreasonable unless the expense is excessive).

³⁷ See, e.g., *In re Rybicki*, 138 B.R. 225, 228-29 (Bankr. S.D. Ill. 1992) (a camper not held to be a reasonably necessary expense); *In re Struggs*, 71 B.R. 96, 98 (Bankr. E.D. Mich. 1987) (motor home held to be a luxury item); *In re Hedges*, 68 B.R. 18, 20 (Bankr. E.D. Va. 1986) (boat considered a luxury item because debtor's occupation did not require its use).

³⁸ The decision to allow or disallow the tithe as a reasonably necessary expense in the context of a Chapter 13 bankruptcy could implicate the First Amendment rights of free exercise, association, free speech, and the guarantee against an establishment of religion. See *supra* note 12.

³⁹ *In re Sturgeon*, 51 B.R. 82, 83 (Bankr. S.D. Ind. 1985).

⁴⁰ See, e.g., *In re Curry*, 77 B.R. 969, 970 (Bankr. S.D. Fla. 1987) (stating that "[t]he effect of such a deduction is to permit the debtor to require that his creditors contribute to his chosen charity"); *In re Gaukler*, 63 B.R. 224 (Bankr. D.N.D. 1986) (noting that the debtors' "willingness to make religious contributions . . . smacks of irresponsibility. Apparently they are willing, on the basis of church dictates, to sacrifice the financial well-being of themselves and their children in order to make contributions they obviously cannot afford."); *In re Sturgeon*, 51 B.R. at 83 (noting that although tithing is a "noble thought and gesture" on the part of the debtor, there is no "church law requiring this donation; it is more a matter of conscience"); *In re Breckenridge*, 12 B.R. 159, 160 (Bankr. S.D. Ohio 1980) (stating that "[c]hurch tithes, per se, are certainly not held in disfavor by this Court. However, in light of the severe financial difficulties of these debtors, it would appear prudent that they devote maximum resources under the plan to the repayment of their

It was not until 1987 that the free exercise implications of claiming a tithe as a necessary expense were first addressed. In *In re Green*,⁴¹ a Michigan court treated the problem as a free exercise issue and allowed the tithe over the objections of the creditors. The court ruled that a "denial of the confirmation solely because the debtors propose to tithe would be unconstitutional."⁴² The court reasoned that to condition the approval of the debtor's plan on the requirement that the debtor stop tithing would put pressure on the debtor to violate her religious beliefs.⁴³ The court held that "such a burden on religion can be justified only by proof of a compelling state interest."⁴⁴ The court could find no such interest and ordered confirmation of the plan with the tithe.⁴⁵

The *Green* analysis, however, has not gained much support in bankruptcy courts. The vast majority of cases have rejected the constitutional approach of *Green*.⁴⁶ In fact, there are only a few decisions that have even confirmed a

obligations, leaving a matter of tithing to their church to a time when they can better afford such a financial commitment."); *In re Cadogan*, 4 B.R. 598, 600 (Bankr. W.D. La. 1980) (stating that "[s]he was advised by the court that this amount was excessive, in view of the niggardly manner in which creditors were being treated and that if she wished to continue to make this contribution, other expenditures would have to be reduced").

⁴¹ 73 B.R. 893 (Bankr. W.D. Mich. 1987), *aff'd.*, 103 B.R. 852 (W.D. Mich. 1988).

⁴² *Id.* at 895 (citing *Hobbie v. Unemployment Appeals Comm.*, 480 U.S. 136 (1987)). The *Green* court rejected the approach of *In re Sturgeon*, 51 B.R. 82, *In re Breckenridge*, 12 B.R. 159, and *In re Cadogan*, 4 B.R. 598. *In re Green*, 73 B.R. 894 n.1.

⁴³ *In re Green*, 73 B.R. at 896.

⁴⁴ *Id.* But see David W. Chase, Case Comment, *Resolving the Conflict Between Chapter 13 of the Bankruptcy Code and the Free Exercise Clause—In re Green: A Step in the Wrong Direction*, 57 Miss. L.J. 163 (1987) (arguing that although the court properly used the strict scrutiny analysis, it failed to take into account the legitimate government interests of protecting third parties from injurious acts). Also, the state did not argue that a compelling state interest existed that would justify the burden on religious expression. Rather the state claimed that granting the tithe as an expense would violate the Constitution's Establishment Clause. *In re Green*, 73 B.R. at 894-95.

⁴⁵ *In re Green*, 73 B.R. at 894-95. On appeal, the District Court insinuated that denial of the tithe would not violate the debtor's free exercise rights, but upheld the bankruptcy court's decision because it found the exemption did not violate the Establishment Clause of the First Amendment. *Michigan v. Green*, 103 B.R. 852, 854 & n.2 (Bankr. W.D. Mich. 1988).

⁴⁶ *In re Reynolds* dismissed the *Green* free exercise argument as dictum and denied confirmation of a Chapter 13 plan because the debtor had included a tithe in the budget. 83 B.R. 684, 684-85 (Bankr. W.D. Mo. 1988). The court instead focused on the "reasonably necessary" requirement and determined that a small portion of the budget could be dedicated to a tithe, but that "that amount will need to be below 3% of gross income unless very unusual circumstances are present." *Id.* at 685.

debtor's plan in light of a provision for religious contributions.⁴⁷ Perhaps the courts were waiting for guidance from the Supreme Court—guidance that the courts apparently got in the 1990 case *Employment Division v. Smith*.⁴⁸

A Pennsylvania court, in *In re Navarro*, allowed the claimed tithe, but denied that a constitutional issue was raised. 83 B.R. 348 (Bankr. E.D. Pa. 1988). The court stated that "the role of the bankruptcy court under 1325(b) is not to award or deny substantive government benefits, but rather to balance the interests of various private parties according to neutral principals [sic] emanating from Congress," and thus, the Constitution was not implicated. *Id.* at 352. Rather, the court accepted that some level of religious or charitable expenditures are necessary for the maintenance and support of Chapter 13 debtors. *Id.* at 356. And the court found that tithing was a reasonably necessary aspect of this particular family's support. *Id.* at 357.

The *Navarro* court then proceeded to explain that even if a bankruptcy discharge was deemed to be a government benefit, denial of a Chapter 13 confirmation would be constitutionally permissible. *Id.* at 353. A debtor "could tithe from assets which are not property of the estate, or could file (or convert to) a case under Chapter 7 . . ." *Id.* (citation omitted). The judge further stated that "[e]ven if I were to decide that strict scrutiny is appropriate, I would find that application of section 1325(b) here serves a compelling government interest: that being administration of the bankruptcy system and protection of the legitimate interests of creditors." *Id.*

In re Miles held that "[w]hile church donations may be a source of inner strength and comfort to those who feel compelled to make them, they are not necessary for . . . maintenance or support of the debtor . . ." 96 B.R. 348, 350 (Bankr. N.D. Fla. 1989). *In re Tucker* found that to allow a Chapter 13 debtor "to deduct contributions to any organization" would be to force "the debtor's creditors to contribute to the debtor's church or favorite charity." 102 B.R. 219, 220 (Bankr. D.N.M. 1989).

The court in *In re Packham* held that to decide if a debtor has a "bona fide personal commitment" would force courts to pass on the legitimacy of the organization to which the debtor wished to contribute. 126 B.R. 603, 609 (Bankr. D. Utah 1991). The *Packham* court held that courts should not be making such decisions and that to avoid "superimposing its values for those of the debtor" tithes should be held not necessary. *Id.* at 609–10.

⁴⁷ *In re McDaniel*, 126 B.R. 782 (Bankr. D. Minn. 1991) (finding judicial analysis of the tithe to be acceptable). The *McDaniel* court held that a bankruptcy court would "not violate the First Amendment by concluding that a proposed level of tithing in a particular case is excessive, and thus not reasonably necessary, under the facts of the case." *Id.* at 785; *In re Bien*, 95 B.R. 281, 283 (Bankr. D. Conn. 1989) (holding if the tithe is an "integral part of the religion rather than a discretionary donation" then it must be allowed because consideration of the tithe would fall "beyond the purview" of the court's inquiry). Similar to *Navarro*, the court in *Bien* stated that the relevant test was "whether the proposed expense fulfills a bona fide personal commitment to serve or promote some religious . . . purpose" and whether that choice is nondiscretionary. *Id.* at 282; *In re Green*, 103 B.R. 893; *In re Navarro*, 83 B.R. 348.

⁴⁸ 494 U.S. 872 (1990).

IV. THE *SMITH* DECISION

In *Smith*, the petitioners had been fired from their jobs at a drug rehabilitation organization because they ingested peyote for sacramental purposes at a ceremony of the Native American Church.⁴⁹ When the petitioners applied for unemployment benefits, they were determined to be ineligible for compensation because they had been discharged for work-related "misconduct."⁵⁰ The petitioners claimed that the government may not condition the availability of unemployment compensation on an individual's willingness to forego conduct required by religion.⁵¹ The Supreme Court answered, however, that if prohibiting the exercise of religion is not the object of the law, but merely the "incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."⁵²

The Court went on to state that it had "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the state is free to regulate."⁵³ The Court held that neutrally enacted laws "cannot interfere with . . . religious beliefs and opinions, [but] they may with practices."⁵⁴ Thus, on its face, *Smith* appeared to be directly applicable to the situation of tithing in bankruptcy.

The Code does not represent a case of the government trying to control people's religious beliefs. The language of Chapter 13 and its legislative history, rather, show an absence of any consideration of religion.⁵⁵ Thus, any effect on religion is an "incidental effect" of the type described by the Court in

⁴⁹ *Id.* at 874.

⁵⁰ *Id.*

⁵¹ *Id.* at 876.

⁵² *Id.* at 878.

⁵³ *Id.* at 878-79.

⁵⁴ *Id.* at 879 (quoting *Reynolds v. United States*, 98 U.S. 145 (1897)).

⁵⁵ See 11 U.S.C. §§ 1301-1330 (1990). The legislative history is informative in this regard:

Chapter 13 relief is essentially equitable, and contemplates a substantial effort by the debtor to pay his debts. Such an effort, by definition, may require some sacrifices by the debtor, and some alteration in prepetition consumption levels. Thus, the debtor might reasonably be required to devote to the plan that portion of his income which is not necessary for support of the debtor and his family. The courts may be expected to determine norms for such support, and Labor Department cost of living figures may provide some help. This approach will permit plans to be confirmed where the debtor does make a substantial effort to pay his debts, even though the payment itself is not substantial.

Smith. Following *Smith*'s reasoning, because section 1325(b) is a neutral, secular piece of legislation that has, at most, an indirect effect on religious conduct, debtors may not make a free exercise claim to justify inclusion of the tithe as a reasonable and necessary expense.

The Supreme Court apparently had reinforced the approach of the majority of bankruptcy courts.⁵⁶ In deciding whether a tithe should be allowed, a bankruptcy court could determine whether or not the tithe was "reasonably necessary" without concern for its free exercise implications. But *Smith* was a controversial decision. It was widely condemned by both scholars and jurists.⁵⁷ Justice Souter called for the re-examination of *Smith*, finding it "an intolerable tension in free-exercise law."⁵⁸ Although little noticed by the general public, reform of the *Smith* decision has been a top legislative priority of the American religious community for the past two years.⁵⁹ In response to religious outcry and other pressures, Congress passed, and President Clinton signed into law, the Religious Freedom Restoration Act of 1993 (RFRA), which overruled the *Smith* decision.⁶⁰

In section 2 of the RFRA (Congressional Findings and Declaration of Purposes), Congress found that because "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise,"⁶¹ the compelling interest test established by *Sherbert v. Verner*⁶²

S. REP. NO. 65, 98th Cong. 1st Sess. 22 (1983).

⁵⁶ See *supra* part III.

⁵⁷ See, e.g., *Church of Lukum Babalu v. City of Hialeah*, 113 S. Ct. 2217, 2248 (1993) (Souter, J., concurring); Milner S. Ball, *The Unfree Exercise of Religion*, 20 CAP. U. L. REV. 39 (1991); Theresa Cook, *The Peyote Case: A Return to Reynolds*, 68 DENV. U. L. REV. 91 (1991); Richard K. Sherwin, *Rhetorical Pluralism and the Discourse Ideal: Countering Division of Employment v. Smith, A Parable of Pagans, Politics, and Majoritarian Rule*, 85 NW. U. L. REV. 388 (1991); Karin M. Rebesch, Note, *The Illusory Enforcement of First Amendment Freedom: Employment Division, Department of Human Resources v. Smith and the Abandonment of the Compelling Governmental Interest Test*, 69 N.C. L. REV. 1332 (1991). But see William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991).

⁵⁸ *Hialeah*, 113 S. Ct. at 2248 (Souter, J., concurring).

⁵⁹ Mark Silk, *New Law Overturns Supreme Court, Expands Freedom to Practice Religion*, ATLANTA J. & CONST., Nov. 20, 1993, at E8.

⁶⁰ Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488.

⁶¹ *Id.* § 2(a)(2).

⁶² 374 U.S. 398 (1963) (holding that government may substantially burden a person's free exercise of religion only if it demonstrates that application of the burden to that person is in furtherance of a compelling governmental interest); see *infra* notes 75-80 and accompanying text.

should be restored "in all cases where free exercise of religion is substantially burdened" by governmental action.⁶³

The implications of the RFRA upon the Code are uncertain. I propose, however, that despite the overturning of *Smith* and the return to the *Sherbert* free exercise analysis, the majority of bankruptcy courts are correct in not analyzing the free exercise effects of tithing in a case-by-case approach. Denial of the tithe as a "reasonably necessary" expense in a Chapter 13 bankruptcy is not a denial of the free exercise of religion.⁶⁴

⁶³ Religious Freedom Restoration Act of 1993 § 2. The congressional findings and declaration of purposes is as follows:

(a) FINDINGS—The Congress finds that—

(1) the framers of the Constitution, recognizing free exercise of religion as an inalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral towards religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) PURPOSES—The purposes of this Act are—

(1) *to restore the compelling interest test as set forth in Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

Id. (emphasis added).

⁶⁴ The first test of the RFRA as it applies in a Chapter 13 bankruptcy was in a case filed on May 23, 1994, in Minnesota. The Justice Department has sided with the creditors that a tithe may not be claimed as a reasonably necessary expense. White House spokesman Arthur Jones stated that the issue is a "straight application of the bankruptcy code. Because the code applies to both religious and nonreligious organizations, we don't think there's an implication for the RFRA." Goodstein, *supra* note 1.

V. FREE EXERCISE ANALYSIS

A. *Initial Assumptions*

The “freedom” guaranteed in the Free Exercise Clause of the First Amendment is not absolute. The Supreme Court has established two hurdles that a person must clear before she may assert that her free exercise of religion has been unlawfully violated. She must first establish that her religious belief is sincere. She must then show that she views the religious practice in conflict with the secular law as an obligation, and not a mere preference.

The Supreme Court has long recognized that a preliminary determination of the sincerity of religious belief is essential to free exercise analysis.⁶⁵ In *United States v. Seeger*,⁶⁶ the Court stated that although the “‘truth’ of a belief is open to question, there remains the significant question whether it is ‘truly held.’ This is the threshold question of sincerity which must be resolved in every case.”⁶⁷

Such a demonstration is necessary in order to avoid the danger of people taking advantage of religious exemption for reasons other than the dictates of their faith.⁶⁸ Thus, to prevent fraudulent claims the court must inquire into the debtor’s faith to establish that the belief in tithing is sincere. Such an inquiry is necessary in a Chapter 13 petition because an individual seeking Chapter 13 relief must pay as much of the debt incurred as possible.⁶⁹ When debtors claim a religious obligation to tithe, they are, in effect, asking for a deduction in the amount of debt they owe. The possibilities for abuse are obvious. Debtors would certainly rather give money to family, friends, or their church than to

⁶⁵ Although the Court requires an inquiry into the sincerity of religious belief, it rejects inquiries into the “centrality” of a given practice or belief. *See, e.g., Employment Div. v. Smith*, 494 U.S. 872, 886–87 (1990) (“Judging the centrality of different religious practices is akin to the unacceptable ‘business of evaluating the relative merits of different religious claims.’”) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.2 (1983) (Stevens, J., concurring)); *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989) (“It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants’ interpretation of those creeds.”).

⁶⁶ 380 U.S. 163 (1965).

⁶⁷ *Id.* at 185.

⁶⁸ For example, the debtor could use the tithe as a last minute allocation to her church. If the debtor had never tithed before, or her church did not require tithing, or most of the members of her church did not tithe, then the contribution is best viewed as a fraudulent conveyance, and not as an expression of religious freedom. *See* 11 U.S.C. § 727(a)(2).

⁶⁹ *Id.* § 1325(b).

their creditors who they often perceive as impersonal entities that are persecuting them.

Second, the obligation to tithe must be more than a preference—the debtor must view it as an obligation. A debtor who merely chooses to tithe should not be eligible for an exemption based upon the Free Exercise Clause.⁷⁰ The Supreme Court has clearly limited constitutional protection only to those whose challenged conduct was mandated by their religious beliefs.⁷¹ Those beliefs, however, do not have to be the credo of a particular religion. Rather, the Supreme Court has framed the inquiry in terms of the particular religious adherent's subjective belief.⁷²

Thus, if the Free Exercise Clause is implicated, bankruptcy judges must first determine if the individual debtor *sincerely* believes that tithing is an obligation of her religion. Also, debtors who merely choose to tithe would not be eligible. Constitutional protection extends only to those individuals who are forced to cease participation in one of the precepts of their faith in order to receive a government benefit. Many dangers exist in this awkward preliminary assessment. Arguably, most courts lack the competence to assess sincerity in a religious context. Also, in defining "religion" there is the danger of judicial imposition of values. Courts will be forced to walk a narrow line in trying not

⁷⁰ The debtor should not be eligible because constitutional protection only extends to those people who are forced to choose between receiving a government benefit and the dictates of their faith. *See generally* Russell W. Galloway, *Basic Free Exercise Analysis*, 29 SANTA CLARA L. REV. 865, 869–71 (1989).

⁷¹ In *Sherbert v. Verner*, the Court ruled that to condition the receipt of government benefits upon the claimant's "willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties." 374 U.S. 398, 406 (1963). Similarly, in *Thomas v. Review Bd.*, the Court held:

Where the State conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists.

450 U.S. 707, 717–18; *see also* *Hobbie v. Unemployment Appeals Comm.*, 480 U.S. 136 (1987).

⁷² *See Thomas* for an example of the Court's acceptance of subjectively based religious beliefs. In *Thomas*, despite the fact that the claimant's beliefs were in contrast with those of the other members of his faith, and that they were inconsistent and illogical, the Court determined that the free exercise doctrine should be applied. 450 U.S. at 714–16; *see also* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1243 (2d ed. 1988) (discussing the *Thomas* decision).

to make impermissible content judgments regarding what is and is not a "proper" religious conviction.⁷³

Furthermore, courts can anticipate an increase in fraudulent tithing claims in the face of the inherent difficulty of proving that a person really does not believe in what she professes to believe. Court time and costs will also increase. But if a constitutional right is really infringed, then an increase in costs and the creation of a situation where judges must make very difficult and personal decisions are not excuses for ignoring that right.

B. *Free Exercise Jurisprudence*

It is unnecessary to give a detailed history of the Supreme Court's Free Exercise jurisprudence because of the recent enactment of the RFRA. The RFRA explicitly states in section 2 that the purpose of the law is "to restore the compelling interest test as set forth in *Sherbert v. Verner*."⁷⁴

The *Sherbert* case involved a Seventh Day Adventist's claim of exemption from a Saturday work requirement under state unemployment law.⁷⁵ The Court formulated a version of strict scrutiny as the prevailing standard for free exercise exemption claims.⁷⁶

The approach is a two-step inquiry. First, the court must determine if the regulation in question imposes a substantial burden on the claimant's religious belief.⁷⁷ Second, if the burden is established, the court should consider whether "some compelling state interest . . . justifies the substantial infringement of [the claimant's] First Amendment right."⁷⁸ As presented in *Sherbert*, this standard is used in analysis of all regulations of religious conduct—whether direct or indirect.⁷⁹

⁷³ Critics have pointed out in the past that such inquiries have tended to favor mainstream religions and those minority sects that share significant points in common with the mainstream beliefs. The more "bizarre" the belief in question, the more likely it is to be labeled "nonreligious" or "insincere." See William P. Marshall, "We Know It When We See It": *The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 512 (1986); William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545, 555-56 (1983).

⁷⁴ Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488. For the text of the RFRA, see *supra* note 63.

⁷⁵ *Sherbert v. Verner*, 374 U.S. 398 (1963).

⁷⁶ *Id.*

⁷⁷ *Id.* at 403.

⁷⁸ *Id.* at 406.

⁷⁹ *Id.* at 403-04.

Thus, two questions must be answered: whether denial of religious tithing to Chapter 13 debtors would substantially burden the free exercise of their religion, and if so, whether the government's refusal to allow tithes is necessary to support a compelling governmental interest.⁸⁰

C. Substantial Burden

At first glance the denial of a sincere religious obligation to tithe does place a substantial burden on the bankruptcy debtor. Denial of the tithe apparently could deprive the debtor of important religious expression, religious association, and the benefits of church membership. Denial of the tithe also apparently affects even more deeply held religious beliefs. Some debtors may believe that to cease tithing may threaten their very salvation. Thus, it appears that whether or not the denial of the tithe places a substantial burden on the debtor is irrefutable. But first impressions can be deceiving.

The premise behind the above arguments is that the debtor has no choice—that the denial of the tithe forces the debtor to choose between a financial fresh start and their religious obligations. To make that assumption, however, is to assume that all people have a right to a Chapter 13 bankruptcy and that there are no other bankruptcy alternatives. Neither of these assumptions is true.

Chapter 13 relief is not available to everyone who applies. Only an individual with regular income may be a debtor under Chapter 13.⁸¹ Thus, if religious adherents cannot prove regular income, then no matter how much they want Chapter 13 relief, they will not receive it. Chapter 13 relief is also available only to debtors with relatively small estates: as of the date of the bankruptcy petition, the debtor's noncontingent, liquidated unsecured debts must be less than \$100,000, and noncontingent liquidated secured debts must be less than \$350,000.⁸² Also, if the debtor wishes to file a joint petition, the combined debts must be within the limits set for an individual.⁸³ Thus, a claimant who wishes to tithe and has a large amount of debt may not seek Chapter 13 relief. Also, if the debtor is a stockbroker or a commodity broker she cannot file under Chapter 13.⁸⁴

In addition to the requirements that a Chapter 13 debtor file in good faith⁸⁵ and allocate all of her disposable income to the payment plan,⁸⁶ there are the

⁸⁰ *Id.* at 403.

⁸¹ 11 U.S.C. § 109(e).

⁸² *Id.* An example of a secured debt that will often make people ineligible is a home mortgage.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* § 1325(a)(3).

preliminary requirements that a debtor must meet before she can even file a petition.⁸⁷ To view the denial of a tithing exemption as a substantial burden is a mistake, for it assumes that the debtor's choices are either to cease tithing or to give up the opportunity to work out one's debt.⁸⁸ That assumption is not the case, however. Chapter 13 is not the only provision under which a debtor may file, and it is not always the most advantageous chapter under which a debtor may file. Rather, Chapter 13 is the most restrictive in terms of who may and may not claim relief under it. The choice is not Chapter 13 or financial ruin—it is Chapter 13 with no tithe, Chapter 11, Chapter 7, or file no bankruptcy and work out debt without government aid.⁸⁹

Commentators tend to assume that all other chapters offer nothing to the debtor,⁹⁰ but that assumption is not true. If a debtor wishes to tithe, she may opt for a Chapter 7 in which all but exempted assets will be liquidated and sold in payment of her debts.⁹¹ The debtor's debts are then discharged immediately.⁹² The debtor may then begin to tithe immediately from her new income.⁹³ A misconception of Chapter 7 is that it will leave the debtor destitute and that all of her assets will be gone. But this concept is not correct, the point of Chapter 7 bankruptcy is to repay creditors *and* to help the debtor obtain a fresh start.⁹⁴ The debtor is able to keep a portion of her interest in her home,⁹⁵

⁸⁶ *Id.* § 1325(b).

⁸⁷ *Id.* § 109(e); *see supra* notes 81–84 and accompanying text.

⁸⁸ *But see* Donald R. Price & Mark C. Rahdert, *Distributing the First Fruits: Statutory and Constitutional Implications of Tithing in Bankruptcy*, 26 U.C. DAVIS L. REV. 853, 907 (1993) (arguing that because Chapter 7 is not very attractive, the debtor must either accept the court's budget or give up the opportunity to work out her debt).

⁸⁹ Bankruptcy is not the only method to work out debt payment. State law offers many remedies that may be preferable to bankruptcy because they do not stain one's credit record. For example, execution, garnishment, judgment liens, and voluntary liens.

⁹⁰ *See, e.g.,* Price & Rahdert, *supra* note 88; Carol Koenig, Comment, *To Tithe or Not to Tithe: The Constitutionality of Tithing in a Chapter 13 Bankruptcy Budget*, 32 SANTA CLARA L. REV. 1231, 1246–47 (1992).

⁹¹ 11 U.S.C. § 726.

⁹² Discharge is granted during the course of the case, after expiry of the period for filing objections to discharge. RULES OF PRAC. & PROC. IN BANKR. 4004.

⁹³ All of the debtor's postpetition income is property of the debtor, thus the debtor may use it as he sees fit. 11 U.S.C. § 541(a)(6); *see* BLUM, *supra* note 31, § 28.3.

⁹⁴ 11 U.S.C. § 522 (allowing exemptions that are granted at the expense of creditors, whose recourse is limited to nonexempt assets); *see generally* KING & COOK, *supra* note 31.

⁹⁵ 11 U.S.C. § 522(d)(1). Under § 522(b) of the Code, states are authorized to "opt out" of the federal scheme and provide their own exemptions. Currently, 39 states have opted-out. Thus a debtor filing for federal bankruptcy in those states may only exempt property that is protected by that state's laws. WARREN & WESTBROOK, *supra* note 31, at 226–27.

motor vehicle,⁹⁶ jewelry,⁹⁷ household goods,⁹⁸ clothes,⁹⁹ animals,¹⁰⁰ books,¹⁰¹ professional books and tools of the trade,¹⁰² life insurance,¹⁰³ health aids,¹⁰⁴ government benefits,¹⁰⁵ and the like.¹⁰⁶

Although usually used by a business for bankruptcy, the Supreme Court has held that an individual debtor can also use Chapter 11 as well.¹⁰⁷ The debtor may wish to use Chapter 11 if she would like to keep her property and make payments. Under Chapter 11, just like under Chapter 13, estate property is revested in the debtor upon confirmation of the plan of repayment.¹⁰⁸ But, unlike Chapter 13, the creditors vote on the plan and the debtor is allowed to solicit votes.¹⁰⁹ The debtor may bargain for the right to tithe. Also, the plan's length is not limited to three or five years, but may be as short or as long as the debtor wishes it to be. There is no statutory limit to payments; the length is set by the plan.¹¹⁰

The biggest advantage that Chapter 13 has over Chapter 11 or Chapter 7 is that the discharge in Chapter 13 allows the debtor to discharge debts that would not be dischargeable in the other chapters.¹¹¹ These dischargeable debts include fines or damages for willful or malicious injury,¹¹² for fraud while acting in a

⁹⁶ 11 U.S.C. § 522(d)(2).

⁹⁷ *Id.* § 522(d)(4).

⁹⁸ *Id.* § 522(d)(3).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* § 522(d)(6).

¹⁰³ *Id.* § 522(d)(7).

¹⁰⁴ *Id.* § 522(d)(9).

¹⁰⁵ *Id.* § 522(d)(10)(A)-(C).

¹⁰⁶ In addition to the listed exemptions, debtors are allowed to exempt up to \$4150 in any property they choose. *Id.* § 522(d)(5). Debtors also receive the following exemptions: alimony, child support or maintenance; pension plan; crime victim award; wrongful death award; personal injury award; and loss of future earnings. *Id.* § 522(d)(10)-(11).

¹⁰⁷ *Toibb v. Radloff*, 501 U.S. 157 (1991).

¹⁰⁸ 11 U.S.C. § 1141(b).

¹⁰⁹ *Id.* § 1129.

¹¹⁰ *Id.* § 1121.

¹¹¹ Under § 1328(a), after the debtor finishes all payments under the plan, the debtor will be discharged from all debts provided for by the plan or disallowed under § 502, except debts on which final payment is due after the plan is completed (§ 1322(b)(5) debts) and alimony and support payments (§ 523(a)(5) debts). *Id.* § 1325(a). In contrast, in a Chapter 7 or 11 discharge, all prepetition debts are excused except for those in § 523. *Id.* § 727 & § 1141.

¹¹² *Id.* § 523(a)(6).

fiduciary capacity, for embezzlement or larceny,¹¹³ and for obtaining money, property, or services under false pretenses or by fraud.¹¹⁴ These extra discharges are granted only if the debtor finishes all payments under the plan.¹¹⁵ Chapter 13 debtors, however, fail in large numbers with fewer than one-third still making payments an average of two years after confirmation.¹¹⁶ If a debtor does fail, the court may still grant a discharge, but only if: (1) the failure to complete the payments was caused by circumstances outside the debtor's control, (2) the unsecured creditors received plan payments not less than the amount to which they would have been entitled under Chapter 7, and (3) the plan cannot be modified.¹¹⁷ But a hardship discharge when the plan fails is the same as a discharge under Chapter 7 or 11. Thus, the main reason a debtor would choose a Chapter 13 is lost if that debtor, like most debtors, does not complete the payments as set out in the plan.

It appears that for most debtors who wish to file under Chapter 13 and sincerely claim a tithing exemption, the denial of the exemption would not be a substantial burden. The debtor still has the option of two other chapters from which to gain relief, along with the available state law remedies. It is possible to argue, however, that despite the other options available, and the likelihood that most debtors will fail in a Chapter 13 plan, the denial of Chapter 13 relief is still a substantial burden. But even if the denial of such relief was determined to be a substantial burden and did effectively prohibit the debtor's free exercise of her religious obligations, the judge should still deny the tithing exemption under the free exercise strict scrutiny standard set forth in *Sherbert*.¹¹⁸

D. *Compelling Interest*

If the denial of the tithing exemption has been determined to be a substantial burden on the religion of the debtor, then the court must inquire whether the government interests behind Chapter 13 can be regarded as compelling and whether refusal to allow tithes narrowly serves those interests.¹¹⁹

The governmental interest does not have to be of central importance to the government to be compelling for purposes of free exercise scrutiny. For

¹¹³ *Id.* § 523(a)(4).

¹¹⁴ *Id.* § 523(a)(2).

¹¹⁵ *Id.* § 1328(a).

¹¹⁶ See TERESA A. SULLIVAN ET AL., AS WE FORGIVE OUR DEBTORS 222 (1989).

¹¹⁷ 11 U.S.C. § 1328(b).

¹¹⁸ See *supra* notes 74–80 and accompanying text.

¹¹⁹ *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

example, in *Goldman v. Weinberger*,¹²⁰ the Court found a compelling state interest in securing military uniformity of dress. In *United States v. Lee*,¹²¹ the Court ruled against an Amish claim that paying taxes violated their belief in personal responsibility to take care of members of the community. The Supreme Court found that the government's interest in "maintaining a sound tax system" free from a "myriad of exceptions flowing from a wide variety of religious beliefs" overrode a claim for religious exemption.¹²² In *Braunfeld v. Brown*,¹²³ the Court rejected a free exercise claim brought by Orthodox Jews to challenge Sunday closing laws. The Court found providing a day of rest to be a compelling governmental interest.¹²⁴

Bowen v. Roy,¹²⁵ however, may be most indicative of the Court's free exercise approach. In that case, a Native American objected to the Social Security Administration's use of a Social Security number in connection with welfare benefits for his daughter.¹²⁶ The Court accepted at face value his claim that use of the number would, according to his Abenaki religious beliefs, rob his daughter of her spirit¹²⁷—an undeniably substantial burden on religion. But the Court ruled for the government.¹²⁸ It accepted the government's claim that its need to use Social Security numbers for administrative efficiency and control of fraud was enough to override the heavy religious burden.¹²⁹

If "maintaining a sound tax system" free from a "myriad of exceptions" is a compelling governmental interest, then it appears that maintaining a sound bankruptcy system is compelling as well. And if, as in *Bowen*, administrative efficiency and reduction in fraudulent conveyances are compelling interests, then it would seem apparent that administrative efficiency and the reduction of fraudulent conveyances through tithing are also compelling interests.

¹²⁰ 475 U.S. 503 (1986); *see also* *Gillette v. United States*, 401 U.S. 437 (1971) (concluding that requiring military conscription of persons religiously opposed to particular wars, as opposed to all wars, does not violate the Free Exercise Clause).

¹²¹ 455 U.S. 252 (1982).

¹²² *Id.* at 260; *see also* *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378 (1990) (holding that imposition of sales and use tax on distribution of religious materials does not violate the Free Exercise Clause); *Hernandez v. Commissioner*, 490 U.S. 680 (1989) (finding denial of tax deduction for religious payment does not violate the Free Exercise Clause).

¹²³ 366 U.S. 599 (1961).

¹²⁴ *Id.*

¹²⁵ 476 U.S. 693 (1986).

¹²⁶ *Id.* at 695.

¹²⁷ *Id.* at 696.

¹²⁸ *Id.* at 712.

¹²⁹ *Id.* at 709.

E. Ambiguity Due to Amount

Another aspect of the tithe argument makes it inherently self-defeating. If tithes were to be allowed as exemptions, courts would have to deal further with the question of amount. Once a bankruptcy court has decided that tithing is an allowable expense, it may confront a range of claims running from very modest to extremely large ones. The court must then apply the same constitutional principles that allowed the tithe itself to the amount claimed. To be consistent, the court should accommodate not only the individual's decision to tithe, but also her decision regarding the amount.¹³⁰

In some situations, honoring the debtor's decision as to amount would prevent significant repayment of creditors.¹³¹ If the amount of the tithe would be so high as to make the payment to creditors less than they would receive in Chapter 7, the debtor would be forced out of Chapter 13.¹³² Or if repayment were to reach low levels such as one percent, the situation would be exactly what the 1984 Amendments were trying to correct.¹³³

For a debtor whose required tithe amount is so high that creditors will receive greatly diminished repayment, the court must deny the debtors Chapter 13 relief, or cut the amount of the tithe. How much should it be reduced? Reducing the tithe would be exactly the type of violation of the Free Exercise Clause that those who argue for allowing the tithe seek to avoid. To deny a debtor Chapter 13 relief because of the amount of her tithe is to refuse to ratify the plan solely because of the tithe. Thus, those who argue that the tithe must be an allowable expense will assuredly face a situation when they will be forced to violate the rights of the person they sought to protect.

¹³⁰ To be consistent, if a court is to honor sincere religious belief, the same burdens on religion that result from failure to contribute anything to the church can also result from failure to give as much as one's religion commands. This point is especially true if the church conditions full participation in the life of the church on the act of tithing a specific amount, as some religions do. For example, one bankruptcy court reports that the Church of Jesus Christ of the Latter Day Saints (the Mormon Church), requires its members to tithe in order to remain in good standing with the church. The Mormons find this obligation in the passage from *Malachi* 3:8-12. See text *supra* note 4; *In re Packham*, 126 B.R. 603, 604 n.2 (Bankr. D. Utah 1991).

¹³¹ As the amount of the tithe that the debtor claims as a reasonably necessary expense increases, the amount of income available to pay creditors decreases progressively.

¹³² 11 U.S.C. § 1325(a)(4) provides that the court should confirm the proposed plan if, among other things, "the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date."

¹³³ See *supra* notes 18-20 and accompanying text.

VI. CONCLUSION

The RFRA does not require that debtors who seek bankruptcy relief must be allowed to give to their god before their creditors. The RFRA requires that the government have a compelling interest when government actions substantially burden the exercise of religion.¹³⁴

The denial of a tithe exemption in a Chapter 13 bankruptcy does not create a substantial burden on the religion of the claimant. The debtor is not forced to decide between her religion and bankruptcy relief, but may file under another chapter of the Code. If the denial were a substantial burden, then the goals of maintaining administrative efficiency, providing predictability and substance to the repayment of creditors, and avoiding fraud would be sufficient to form a compelling governmental interest to impose a substantial burden on religion. Thus, denial of the tithe does not violate the free exercise rights of the debtor that are guaranteed by the First Amendment.

Denial of the tithe serves useful purposes as well. Not forcing courts to inquire into the personal religious convictions of debtors prevents the imposition of judicial values upon the debtor. The court system is also benefited by a denial of tithing as a necessary expense because of the administrative costs saved from not having to conduct a detailed inquiry. Although there are costs to any decision concerning the differing interests between the government and an individual's religion, the best choice in the conflict between tithing and Chapter 13 bankruptcy relief is to deny the tithing as an unreasonable and unnecessary expense.

¹³⁴ Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488.